UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 64

Docket No. CB-7121-08-0024-V-1

James Vena,

Appellant,

v.

Department of Labor,

Agency.

April 23, 2009

Charles B. Taylor, Esquire, Herndon, Virginia, for the appellant.

James V. Blair, Esquire, Washington, D.C., for the agency.

Jamila B. Minnicks, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant requests review of an arbitration decision that sustained his removal for inappropriate conduct. For the reasons set forth below, we GRANT the appellant's request under 5 U.S.C. § 7121(d), and AFFIRM the arbitrator's decision.

BACKGROUND

¶2 The agency removed the appellant from the position of Office Automation Clerk, GS-4, effective September 7, 2006, based on a charge of inappropriate conduct. Appeal File (AF), Tab 4, Subtabs 2, 4, 8. The agency charged that, on

July 18, 2006, the appellant "used language and physical gestures against a customer that were insulting, offensive and intimidating." *Id.*, Subtab 2 at 1. After unsuccessfully grieving his removal, the appellant sought arbitration pursuant to the collective bargaining agreement. *Id.*, Subtabs 5, 6. Following a hearing, the arbitrator upheld the agency's removal action, finding that the agency proved the charge, the penalty was reasonable, and the appellant failed to prove his affirmative defenses of harmful procedural error and disability discrimination. AF, Tab 4, Arbitration Decision at 8-28.

¶3 The appellant has sought Board review of the arbitrator's decision under 5 U.S.C. § 7121(d), arguing that: (1) The arbitrator erroneously concluded that the agency proved its charge of inappropriate conduct; (2) the agency violated the appellant's procedural rights, warranting reversal of the action; and (3) the appellant proved his claim of disability discrimination. Appeal File (AF), Tab 4 at 2, 4-11. The agency has responded in opposition to the appellant's request for review. AF, Tab 10.

ANALYSIS

¶4 The Board has jurisdiction to review an arbitration decision under 5 U.S.C. § 7121(d) only when the subject matter of the grievance is one over which the Board has jurisdiction, the employee alleges discrimination under 5 U.S.C. § 2302(b)(1) in connection with the underlying action, and a final decision has been issued by the arbitrator. *Hardison v. Department of the Treasury*, 13 M.S.P.R. 175, 176 (1982). The subject matter of this appeal, the appellant's removal by the agency, falls within the Board's jurisdiction under 5 U.S.C. § 7513, and the appellant alleged before the arbitrator, and now alleges before the Board, that his removal was discriminatory, based upon his disability due to his bipolar disorder, in violation of 5 U.S.C. § 2302(b)(1)(D). Therefore, the arbitration decision is within the Board's jurisdiction to review.

¶5 The standard of the Board's review of an arbitrator's award is limited; such awards are entitled to a greater degree of deference than initial decisions issued

by the Board's administrative judges. *Weaver v. Social Security Administration*, 94 M.S.P.R. 447, ¶ 8 (2003). The Board will modify or set aside an arbitration decision only where the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. *Id.* Absent legal error, the Board cannot substitute its conclusions for those of the arbitrator, even if it would disagree with the arbitrator's decision. *Id.*

The agency proved its charge of inappropriate conduct.

¶6 The appellant first argues that the agency did not prove its charge because it did not produce sufficient evidence to carry its burden of proof. AF, Tab 4 at 4-7. The appellant asserts that only he and James Canady, towards whom the appellant directed his inappropriate language and gestures, witnessed the events in question, that neither version of events was independently corroborated by another witness, and so the agency could not carry its burden of proof. *Id.* Contrary to the appellant's assertions, Mamie Daniel and Ruby Strain both provided written statements at the time of the incident that they witnessed part of the incident; these corroborated Canady's version of events and supported the agency's charge that the appellant yelled insults at Canady and made boxing motions towards Canady as if to fight him. AF, Tab 4, Subtab 11. Canady and Strain both testified at the arbitration hearing materially consistently with their written statements with regard to the appellant's actions. Hearing Transcript (HT) at 29-35, 82-84. The appellant has not shown that the arbitrator applied the law incorrectly to the facts; he only disagrees with the arbitrator's credibility determinations and findings of fact, which are supported by the record evidence. Therefore, the appellant has shown no legal error in the arbitrator's finding that the agency proved its charge of inappropriate conduct.

The appellant did not prove harmful procedural error.

¶7 The appellant argues that the arbitrator erred in upholding his removal because the agency deciding official, Al Stewart, Director, Business Operations Center, committed three errors in reaching his decision to remove the appellant.

AF, Tab 4 at 8-11. Stewart considered a prior incident in which the appellant allegedly showed disrespect to a supervisor, even though the agency did not properly notify the appellant in its proposal notice that this incident would be considered; he considered prior disciplinary action that was taken in 1997, 9 years earlier, and that had not been entered into the record; and he did not take the appellant's bipolar disorder into account as a mitigating factor. *See id.*; Arbitration Decision at 24-25. The appellant asserts that this was harmful procedural error by the agency that warrants reversal of the agency's discipline. AF, Tab 4 at 8-11.

¶8 The arbitrator found that the agency committed errors by considering the incident and disciplinary action to which the appellant refers, and by failing to consider, as a mitigating factor, the appellant's bipolar disorder. Arbitration Decision at 24-28. Accordingly, in assessing whether these errors were harmful, the arbitrator did not defer to the agency's penalty determination but weighed the *Douglas* factors himself, concluding that removal was a reasonable penalty for the proven misconduct. *Id.*

¶9 When an agency intends to rely on aggravating factors, such as prior discipline, as the basis for the imposition of a penalty, such factors should be included in the advance notice of adverse action so that the employee will have a fair opportunity to respond to those factors before the agency's deciding official. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 304 (1981). An agency error is harmful only where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991). An adverse action will not be sustained if an employee demonstrates that, in the absence of the agency's procedural error, the outcome could have been different. *Mercer v. Department of Health & Human Services*, 772 F.2d 856, 859-60 (Fed. Cir. 1985). If the agency errs in its consideration of the *Douglas* factors, its determination of an appropriate penalty is not entitled to deference and the Board will determine if

the agency's penalty was within the bounds of reasonableness. *Bivens v. Tennessee Valley Authority*, 8 M.S.P.R. 458, 461 (1981); *Douglas*, 5 M.S.P.R. at 306.

¶10 Stewart testified that his decision to remove was based mostly on the incident at hand, which he considered aggressive behavior that was not tolerated in the agency, and the appellant's past discipline for similar incidents in 1997 and 2002. HT at 215-17, 232-33, 241-43; *see* AF, Tab 4, Subtab 2 (proposal notice) at 2. He stated that he did not give much weight to the allegation that the appellant had previously shown disrespect to his supervisor. HT at 219-20. The arbitrator, who did not consider the 1997 discipline, also did not consider the allegation of disrespect; he did consider the appellant's bipolar disorder; and he concluded that the penalty of removal was still reasonable under the circumstances because of the nature of his misconduct and because of the appellant's prior discipline in 2002 for similar misconduct. Arbitration Decision at 27-28. In effect, therefore, he concluded that the agency's errors were harmless. The appellant has presented no argument or evidence that the arbitrator misapplied the law in reaching this conclusion. Therefore, he has not shown that the Board should disturb the arbitrator's decision to uphold the penalty of removal.

The appellant did not prove his claim of disability discrimination.

¶11 The appellant argues that he proved discrimination because he was disciplined for the incident in question whereas Canady was not, and this evidenced disparate treatment based upon his disability of bipolar disorder. AF, Tab 4 at 14. He also argues that he requested accommodation for his disability and that the agency failed to provide it, further evidencing discrimination. *Id.* at 14-15.

¶12 An appellant may establish that he is disabled by submitting evidence that he is substantially limited in a major life activity, that he has a record of such a limitation, or that he is regarded as having such a limitation. *Clark v. U.S. Postal*

Service, 74 M.S.P.R. 552, 558 (1997).[*] The arbitrator held that the appellant did not prove that he was disabled in any major life activity by his bipolar disorder. Arbitration Decision at 21.

¶13 We see no error in the arbitrator's analysis of this issue. Neither the testimonies of the appellant and Faheem Moghal, M.D., nor the medical evidence submitted into the record, a psychiatric evaluation from 1998 by Harold Ginzburg, M.D., and a letter from Dr. Moghal in May 2008, indicated that the appellant was substantially impaired in any major life activity by his bipolar disorder. *See* HT at 405-47, 494-501; AF, Tab 4, Exhibit 2; *id.*, Exhibit 8 at 3. Dr. Ginzburg and Dr. Moghal both opined that the appellant was legally disabled or handicapped. AF, Tab 4, Exhibit 2 at 8-9; HT at 415-16. Their conclusory statements, however, are not sufficient to demonstrate that the appellant is legally disabled because they are not supported by medical evidence demonstrating that the appellant was substantially limited in a major life activity; on the contrary, both doctors expressed that the appellant's bipolar disorder was controllable and controlled, and that he was able to function normally and able to perform his work duties. AF, Tab 4, Exhibit 2 at 6-7; *id.*, Exhibit 8 at 3; HT at 411. Therefore, the appellant has shown no error in the arbitrator's finding that he failed to prove he was disabled.

¶14 Moreover, the agency showed that the appellant's misconduct would have justified the discipline imposed, regardless of any disability. Hearing Transcript at 215-17, 241-43. Accordingly, we see no error in the arbitrator's further finding that, even if the appellant had demonstrated disability, his removal would have been justified. Arbitration Decision at 22; *see Laniewicz v. Department of Veterans Affairs*, 83 M.S.P.R. 477, ¶ 5 (1999) (neither the Rehabilitation Act of 1973 nor the Americans with Disabilities Act of 1990 immunizes disabled

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[*] We note that the ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3553, 3555-56 (2008), amended the definition of "disability." The appellant has not argued that he falls within this new definition and so we do not reach that question.

employees from discipline for misconduct in the workplace, provided the agency would impose the same discipline on an employee without a disability).

¶15 For the reasons stated above, we find that the appellant has failed to show legal error by the arbitrator that would require the Board to overturn his decision, and we sustain the arbitrator's decision.

ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this request for review. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your

discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the otherissues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.